No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT CITY OF RIVIERA BEACH, FLORIDA

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(continued from front cover)

QUESTION PRESENTED

In *Hartman* v. *Moore*, 547 U.S. 250 (2005), this Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. Does probable cause likewise defeat a First Amendment retaliatory-arrest claim?

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STATEMENT

1. A City Council governs the City of Riviera Beach, Florida. It holds bimonthly meetings, open to the public, at which it conducts city business. JA 102–03. Toward the end of these meetings, members of the public may address the Council on any matter relating to the City. JA 68, 75–78. But the issues have to relate to the City; "it would not," for example, "be appropriate for someone to come in [to a City Council meeting] and just simply read the editorial section of the New York Times," since "that would have nothing to do with the City of Riviera Beach." Pet. 12a (quoting the District Court's analysis).

Fane Lozman began regularly attending Council meetings almost immediately upon moving to the City in 2006. Lozman is one of many outspoken opponents of the City's plan to redevelop the Riviera Beach marina. He typically used his allotted time to air grievances against City leadership, almost always making vague accusations of corruption and threatening electoral and criminal consequences.

The councilmembers recognized the importance of giving citizens the opportunity to criticize their elected representatives. JA 70. So they let Lozman harangue them without interruption. They did so even on May 17, 2006, when he threatened to launch recall proceedings against a councilmember if she did not resign by noon the next day. ECF 820, ex. 2. And they did so again on June 21, when Lozman asked the public for information regarding mayoral corruption that he could share with "investigators." *Id.*, ex. 3.

2. According to Lozman, the City's hostility to him increased after a closed-door meeting that the Council held on June 28, 2006. As allowed by Florida law, the Council met in private to consult with the City's lawyers in several cases challenging the marina-redevelopment plan, one of which Lozman jointly filed with another City resident. Lozman alleges that, during this meeting, the Council adopted a policy of retaliating against him. But the Council never adopted any such policy. It resolved only to take whatever permissible steps it could to convince the courts and the public of the redevelopment plan's merit.

Lozman's contrary view rests on a mischaracterization of the transcript of that meeting. Specifically, he points to one statement from a single, frustrated councilmember, who vented: "I think it would help to intimidate the same way as [law enforcement] is coming to my house." JA 176. Lozman claims that the Council agreed to this approach by "consensus" (Brief 4), but that is not what happened. Instead, the very same councilmember immediately moved on to address the importance of developing a strategy to defeat these suits. The Council reached a "consensus" only after further discussion consisting of five pages of transcript in the Joint Appendix. JA 181. And rather than agreeing to retaliate against Lozman or anyone else, the Council reached a consensus to invest the money and resources needed to prevail in litigation. JA 181. Every then-councilmember who took the stand below testified to this effect. *See* ECF 770 at 47, 51, 74–75, 126–27; ECF 771 at 153–54. In fact, one member who was "friends with Mr. Lozman" explained that he never would have agreed

to a policy of retaliating against him. ECF 771 at 185–88.

The Council continued allowing Lozman to speak uninterrupted at its meetings in the weeks and months that followed. For example, it allowed him to speak uninterrupted on July 5, when he suggested that the mayor violated federal law by supposedly acting as a "paid lobbyist" for developers. ECF 820, ex. 4. The Council allowed Lozman to finish his remarks on July 19, when he accused the mayor of making racist comments about then-Governor Jeb Bush, and stated that "the escalation and tension between the mayor and myself will continue to accelerate as the course of action I have put into motion to get him indicted for corruption and removed from office marches forward." *Id.*, ex. 5. And it allowed him to complete his remarks when, on September 6, he accused the mayor's brother of biting someone, and asked whether the mayor would require his brother to wear a muzzle. *Id.*, ex. 7.

3. This case now centers on a single instance in which Lozman did not finish his remarks. At the November 15 City Council meeting, Lozman approached the podium. But rather than addressing alleged misconduct by *city* officials—the topic of his previous speeches—Lozman addressed corruption by former Palm Beach *County* officials. *See Activist Arrested at Riviera Beach Council Meeting*, YouTube (Sep. 15, 2009), https://tinyurl.com/lbj5qqj; ECF 820, ex. 8. Because county corruption had no relation to city business, JA 68–69, Councilmember Elizabeth Wade interrupted Lozman, informing him that he could not "stand up and go through that kind of ...." Pet. 4a. Before she finished, Lozman exclaimed "yes,

I will," and resumed his discussion of corruption in the county government. Pet. 4a.

After failing to redirect Lozman, Wade called out: "Officer?" Francisco Aguirre, a police officer providing security for the night's meeting, had never heard of Lozman, attended a City Council meeting, or met any of the councilmembers. Officer Aguirre approached Lozman, whom he quietly asked to follow him outside. When Lozman refused, Officer Aguirre gave him another chance, informing him: "You're going to be arrested if you don't walk outside." Lozman again refused, telling Officer Aguirre that "[he] was not walking outside" because he had not "finished [his] comments." After Officer Aguirre began reaching for his handcuffs, Wade spoke up, asking Aguirre to "carry him out." Instead, Aguirre placed Lozman under arrest before calmly removing him from the meeting. *See* Pet. 4a.

4. Lozman sued the City under § 1983 and a variety of state-law tort theories, including false arrest and battery. His § 1983 action alleged that the City retaliated against him in a number of ways, just one of which is relevant here: Lozman claimed that the City Council adopted a policy of retaliating against him because of his political activism, that Wade asked Officer Aguirre to arrest him because of that policy, and that Officer Aguirre acted on her request. This, Lozman argued, violated the First Amendment.

Eleventh Circuit precedent requires a retaliatory-arrest plaintiff to prove that the police lacked probable cause to make the arrest. *See Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). Thus, one issue

at trial concerned whether Office Aguirre had probable cause to arrest Lozman. Under Florida law, anyone who "willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose commits a misdemeanor of the second degree." Fla. Stat. § 871.01. The district court concluded that there was enough evidence to create a jury question regarding whether Officer Aguirre had probable cause to arrest Lozman under this provision, and instructed the jury accordingly. JA 132–35. The district court declined to instruct the jury on three additional crimes that the City argued supported a finding of probable cause: disorderly conduct, trespass after warning, and resisting an officer in the lawful performance of his duties.

After hearing these instructions, the jury returned a verdict in favor of the City on every single one of Lozman's claims, including his First Amendment retaliatory-arrest claim. JA 140–47. Lozman appealed to the Eleventh Circuit. There, he argued that he was entitled to a new trial because "the jury's verdict finding probable cause to arrest ... was against the great weight of the evidence." Pet. 7a. He did not dispute, however, that he had to prove a lack of probable cause in order to prevail in his First Amendment retaliatory-arrest claim. The Eleventh Circuit thus applied its precedent requiring such proof. And the Eleventh Circuit affirmed, because it found the evidence of probable cause sufficient to justify the jury's verdict in favor of the City.

SUMMARY OF ARGUMENT

A plaintiff who alleges a retaliatory arrest in violation of the First Amendment must plead and prove

that the defendant lacked probable cause to make the arrest.

I. This case is about determining "the elements of, and rules associated with, ... action[s] seeking damages" for constitutional torts. *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017). All four of the factors that this Court considers in performing that function—constitutional principles, tort principles, the distinctive features of the claim at issue, and the values underlying the constitutional right—support the probable-cause element.

A. Start with constitutional principles. In *Hartman* v. *Moore*, this Court held that a plaintiff who claims a retaliatory *prosecution*—in other words, a plaintiff who alleges that an officer prompted a prosecutor to file charges against him in retaliation for his speech—must plead and prove the absence of probable cause. 547 U.S. at 265–66. A plaintiff who claims a retaliatory *arrest* should have to make the same showing; after all, courts have traditionally "treated retaliatory arrest and prosecution claims similarly." *Reichle* v. *Howards*, 566 U.S. 658, 667 (2012). Indeed, requiring plaintiffs to satisfy this objective probable-cause element fits with this Court's longstanding "rejection of [purely] subjective inquiries" when reviewing the constitutionality of police conduct. *Michigan* v. *Bryant*, 562 U.S. 344, 360 n.7 (2011).

B. In addition, the probable-cause element has an ancient tort-law pedigree. At common law, a plaintiff who endures an improperly motivated arrest may sue for malicious prosecution or false imprisonment.

But for hundreds of years, probable cause has defeated each of these tort claims, regardless of the defendant's motive.

C. This longstanding common-law rule makes sense in the context of retaliatory-arrest claims. First, officers must *often* consider protected speech when deciding whether to make an arrest instead of issuing a citation or letting an offender go. Most obviously, a suspect's speech may provide "evidence of a crime." *Reichle*, 566 U.S. at 668. And even speech that does not provide evidence of a crime may still properly influence an officer's discretionary decision to arrest. For example, if police observe someone illegally driving a van through the parking lot of a federal building with the sign "Remember the children of Waco," they might reasonably decide to arrest the driver rather than issue a citation, buying them time to determine whether the driver is a concerned citizen or another Timothy McVeigh. *See Kilpatrick* v. *United States*, 432 Fed. App'x 937, 939 (11th Cir. 2001) (*per curiam*). The probable-cause element permits officers to make arrests in such circumstances without fear of having to later litigate whether their *real* motivation was preventing a massacre or punishing speech.

The probable-cause element matters even with respect to arrests having nothing to do with speech. Without it, officers in the field will be unable to predict whether any given arrest will lead to an expensive, time-consuming trial, and to potential liability. Almost every arrest involves some verbal exchange between officer and suspect. And arrestees often wear t-shirts or display bumper stickers expressing

controversial ideas. Thus, in almost every retaliatory-arrest case, there will be a factual dispute regarding the officer's real motivation—even when the officer did not consider speech at all. This means that almost every case will make it to a jury. Once there, the jurors will be left to speculate about the officer's *real* motivation, which will almost always be inscrutable. The near-certainty of trial, and the uncertainty of its resolution, will deter "all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.). The probable-cause element prevents this.

D. The probable-cause element promotes all of these objectives while still respecting the values underlying the First Amendment. The arrests that are most likely to be retaliatory and that pose the greatest threat to freedom of speech are arrests *unsupported by probable cause*. The probable-cause element ensures that courts can still punish such arrests. By contrast, arrests backed by probable cause are unlikely to be retaliatory and likely pose no realistic danger to the freedom of speech. The probable-cause element helps screen out claims involving such arrests, enabling police to continue protecting society. In addition, the probable-cause element allows police officers to keep order—and thereby foster speech—at protests, marches, and other politically charged events. The lack of a probable-cause safe harbor would discourage officers securing such events from doing their duty, since a lawbreaker could easily allege that the real reason for his arrest was his speech rather than his crime.

II. Lozman's contrary arguments are unpersuasive. Lozman relies principally on *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), where the Court adopted a three-step framework for government employees' retaliation claims. First, the plaintiff must prove that he engaged in protected speech. Next, he must prove that his speech substantially motivated the defendant's decision. Finally, the defendant may prove that it would have made the same decision regardless.

Mt. Healthy's three-part test makes no sense in the arrest context. The First Amendment allows officers to arrest suspects when their speech "provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U.S. at 668. Thus, speech *can be* a substantial factor in the decision whether to make an arrest. Lozman tries to account for this by adjusting *Mt. Healthy*'s second step to require proof that "animus" toward protected speech was a substantial motivating factor in the decision whether to arrest. (Brief 33.) But this subjective evaluation of officer intent will be speculative in almost every case. *Mt. Healthy*'s framework makes sense for resolving employment retaliation cases, where there often *is* significant evidence of intent, ranging from documentary evidence to the employer's treatment of similarly situated individuals. But no such evidence is likely to exist in the highly charged, one-off context of an arrest. Adopting *Mt. Healthy* would sacrifice all the advantages of an objective test for a system in which juries decide whether to award relief on the basis of guesswork—leaving police officers in the wind.

Lozman and his amici also suggest that the Nation faces an epidemic of retaliatory arrests. They offer little evidence to back up this empirical claim. Lozman's brief rests entirely on hypotheticals; it does not discuss a single, proven, real-world instance of a suspect's being arrested in retaliation for his speech. And the examples that most trouble amici involve arrests *without probable cause*—which, of course, would remain punishable even with a probable-cause element. This dearth of retaliatory arrests is unsurprising. Statutes limiting the ability to arrest for minor offenses, the significant costs attendant to unnecessary arrests, and the "good sense" and "political accountability of most local lawmakers and law-enforcement officials," *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 353 (2001), have prevented this imagined parade of horribles from coming to pass, including in jurisdictions that have long required proof of the absence of probable cause.

ARGUMENT

I. A Plaintiff Alleging Retaliatory Arrest Must Show the Lack of Probable Cause

This case is about "determin[ing] the elements of, and rules associated with, an action seeking damages" for a constitutional tort—the tort of retaliatory arrest. *Manuel*, 137 S. Ct. at 920. To identify the elements of a constitutional tort, this Court considers principles of constitutional law, principles of tort law, the distinctive features of the claim, and the values underlying the right. All four factors support requiring a plaintiff who alleges a retaliatory arrest to plead and prove the absence of probable cause.

A. Constitutional principles support a probable-cause element

This Court first considers principles of "constitutional law"—both those underlying the right at issue and analogous principles from "other areas of constitutional law." *Mt. Healthy*, 429 U.S. at 286. Those principles show that plaintiffs claiming retaliatory arrest must prove the absence of probable cause.

1. This Court's most analogous First Amendment decision, *Hartman* v. *Moore*, supports the probable-cause element. The plaintiff, Moore, lobbied hard to get the Postal Service to keep using a particular scanning technology. Along the way, he criticized the Postal Service before Congress. Moore succeeded in his lobbying efforts, but he soon faced criminal charges supposedly stemming from those efforts. After securing an acquittal because of the "complete lack of direct evidence" against him, Moore sued the postal inspectors for "inducing [his] prosecution in retaliation for [his] speech." 547 U.S. at 252, 254. This Court held that, to bring and win such a claim against law-enforcement officers, Moore had to "plea[d] and prov[e]" the "absence of probable cause." *Id.* at 265–66.

Hartman supports a probable-cause element for First Amendment retaliatory-arrest claims too. Courts have traditionally "treated retaliatory arrest and prosecution claims similarly" in light of the "close relationship" between them. *Reichle*, 566 U.S. at 667. In fact, many cases feature "allegations of both retaliatory arrest and retaliatory prosecution" because the same officer who makes the arrest often instigates the prosecution. *Id.* Each claim involves

the same basic allegation: the defendant police officer invoked the criminal process against the plaintiff speaker in retaliation for his protected speech. Each also presents the same fundamental difficulty: a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Id.* at 668. Under either theory, something other than animus—the prosecutor's independent decision to prosecute, or the officer's decision to arrest for reasons unrelated to animus toward the arrestee's speech—may have led to the supposed retaliatory action. *Id.* This kinship suggests there should be "no distinction between claims of retaliatory arrest and claims of retaliatory prosecution when considering the relevance of probable cause." *Id.* at 667.

2. A probable-cause element also comports with the general constitutional principle that courts should use "objective" tests—and should reject wholly "subjective" inquiries—when judging police officers' conduct. *Bryant*, 562 U.S. at 360 & n.7. This Court has applied this principle in a variety of cases, under a variety of provisions of the Bill of Rights. *See, e.g.*, *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991) (occurrence of a "seizure" depends on "objective test"); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (reasonableness of a search or seizure does not depend on officer's "state of mind"); *United States* v. *Leon*, 468 U.S. 897, 922 n.23 (1984) (good-faith exception to exclusionary rule does not depend on "inquiries into the subjective beliefs of law enforcement officers"); *Rhode Island* v. *Innis*, 446 U.S. 291, 301–02 (1980) (occurrence of "interrogation" for purposes of *Miranda* does not depend on "the intent of the police"); *J.D.B.* v. *North Carolina*, 564 U.S.

261, 271 (2011) (characterization of interrogation as "custodial" for purposes of *Miranda* does not depend on "the subjective views harbored by ... the interrogating officers"); *New York* v. *Quarles*, 467 U.S. 649, 656 (1984) (public-safety exception to *Miranda* does not depend on "the subjective motivation of the arresting officer"); *Bryant*, 562 U.S. at 360 (application of the Confrontation Clause to police interrogations depends on "an objective analysis of the circumstances").

Even where a constitutional provision inherently requires some inquiry into a law-enforcement officer's state of mind, the Court has incorporated objective backstops into the constitutional rule, avoiding tests that turn on subjective motivation alone. For instance, an Eighth Amendment claim against a prison officer has both a "subjective component" and an "objective component": the plaintiff must show both that the officer acted "with a sufficiently culpable state of mind" and that the harm he inflicted was "sufficiently serious." *Wilson* v. *Seiter*, 501 U.S. 294, 298 (1991). An equal-protection claim alleging selective prosecution likewise has both a subjective and an objective component: the challenger must show that the prosecutor "was motivated by a discriminatory purpose" and that "similarly situated individuals of a different race were not prosecuted." *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996).

There are good reasons for avoiding purely subjective inquiries—reasons fully applicable to the arrest context. Police officers work in tense, high-pressure, fast-moving situations. They must make split-second decisions; a moment's hesitation may make the

difference between safety or danger or between apprehension and escape. As a result, they need the "clear guidance" embodied in "categorical rules." *Riley* v. *California*, 134 S. Ct. 2473, 2491 (2014). Purely subjective standards deny officers the clarity they need; an officer would have to speculate about how a court or jury will reconstruct his motives after the fact in order to know whether his action will be upheld. It is better to give officers a bright-line rule: if you have probable cause you may arrest without fear of liability; without probable cause, you may not.

Objective tests also protect officers from the burdens of trial on insubstantial claims. As Chief Judge Learned Hand explained, "it is impossible to know whether [a] claim [of improper motive] is well founded until the case has been tried." *Gregoire*, 177 F.2d at 581. To make motive alone decisive, therefore, is "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome." *Id.* This burden would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* Here, an objective probable-cause element, unlike a subjective test, shields officers from baseless litigation, preserving the incentives to discharge their duties without hesitation.

Last, objective tests enable courts to do *their* jobs. Officers often "act with different motives simultaneously or in quick succession," especially in "emergency situation[s]." *Bryant*, 562 U.S. at 368. As a result, "there is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive." *Missouri*

v. *Seibert*, 542 U.S. 600, 626 (2004) (O'Connor, J., dissenting) (quoting Wayne LaFave, *Search & Seizure*, § 1.4(e), p. 124 (3d ed. 1996)). Any legal test that turns on "post hoc findings ... concerning the subjective motivation of the arresting officer" will therefore tend to promote uneven and unreliable results. *Quarles*, 467 U.S. at 656. An objective probable-cause element avoids these problems, allowing courts to uphold objectively legitimate arrests without sorting through the arresting officer's varied motives.

B. Tort principles support a probable-cause element

When identifying the elements of a constitutional tort, this Court also considers "the common law of torts." *Manuel*, 137 S. Ct. at 920; *see, e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994). For good reason. First, the Constitution itself "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 654 (1898). At the framing, "the only way to enforce" the Bill of Rights "was through private law remedies, such as trespass and false imprisonment"; as a result, the elements of those causes of action served as "threshold test[s]," "necessary ... condition[s] for hauling an officer into court." William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1840–41 (2016). Second, "Congress intended [§ 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment," and it accordingly makes sense to "examin[e] common-law doctrine when identifying ...

the elements of the cause of action." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997). Finally, the common law reflects wisdom accumulated "over the centuries." *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978).

1. Two common-law tort theories address improperly motivated arrests: malicious prosecution and false imprisonment. Probable cause defeats each type of claim.

Malicious prosecution is the tort of "put[ting] the criminal law in force"—including by making an arrest—because of an "evil motive." *Wheeler* v. *Nesbitt*, 24 How. 544, 550 (1860). False imprisonment is the tort of confining someone against his will. *Wallace* v. *Kato*, 549 U.S. 384, 388–89 (2007). Plaintiffs can use these two tort theories to sue over arrests made in retaliation for speech. For example, a plaintiff may bring a malicious-prosecution claim against an officer who arrests him for being "too mouthy," *Stoecker* v. *Nathanson*, 98 N.W. 1061, 1061 (Neb. 1904), for the purpose of "knock[ing] him out of a political appointment," *id.*, or "for the purpose of ... administering to [the officer's] vanity," *Gee* v. *Culver*, 11 P. 302, 304 (Or. 1885). Similarly, a plaintiff may bring a false-imprisonment claim against an officer who arrests him "because [the plaintiff] had previously reported [the officer]" for misconduct. Restatement (First) of Torts § 127 (1934). Indeed, Lozman brought one in this very case. *Supra* 4.

Probable cause defeats claims for malicious prosecution and false imprisonment. The "want of probable cause" is an element of malicious prosecution. *Stewart* v. *Sonneborn*, 98 U.S. 187, 192 (1878). Thus,

if the arresting officer "had probable cause," "the motives by which he was actuated ... are not material." *Crescent City Livestock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 149 (1887). "Malice alone, however great, ... is insufficient to maintain an action in damages." *Id.* This rule dates back at least to Lord Mansfield, and it remains the law today. *See Farmer* v. *Darling*, 4 Burr. 1971, 1974 (K.B. 1766); *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 63 & n.7 (1993).

Similarly, since "time immemorial," probable cause has defeated a claim for false imprisonment. *Hawley* v. *Butler*, 54 Barb. 490, 492 (N.Y. 1868); *see Director General of Railroads* v. *Kastenbaum*, 263 U.S. 25, 27–28 (1923). Whether the officer had an "ulterior motive" has never mattered. First Restatement § 127, comment a. For example, if "A, a traffic officer, arrests B for driving at the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," there is no liability for false imprisonment even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127, comment a, illustration 1.

2. Common-law courts had compelling reasons for requiring a plaintiff to show probable cause to recover damages for an arrest, no matter how bad the officer's motive. First, courts emphasized the public interest in ensuring that criminals are caught and punished. *Brockway* v. *Crawford*, 3 Jones 433, 437 (N.C. 1856). The probable-cause test promotes this interest by giving officers in the field a clear and

simple standard to gauge whether they can make a given arrest without fear of liability. "By holding [officers] exempt from responsibility for an arrest ... unless the arrest is made ... without probable cause," "the law encourages ... officers, to keep a sharp look-out." *Id.* Thanks to this probable-cause safe harbor, a police officer can do his work without having to "choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967).

Second, common-law courts recognized that the probable-cause element protects officers from improper lawsuits. They appreciated that improper motive is easy to allege, but hard to disprove—particularly because "malice might easily be inferred sometimes from idle and loose declarations." *Chesley* v. *King*, 74 Me. 164, 176 (Me. 1882). Thus, it would not "be wise as a matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground." *Id.* at 175–76. In this respect, the probable-cause test served as "a kind of qualified immunity built into the elements of the tort." *Kalina*, 522 U.S. at 133 (Scalia, J., concurring).

Finally, courts addressing malicious prosecution understood that the objective probable-cause element serves as a useful proxy for improper subjective motivation. As this Court said long ago, "it is unquestionably true that want of probable cause is

evidence of malice." *Wheeler*, 24 How. at 550. Put another way, "malice ... may be inferred ... from want of probable cause." *Stewart*, 98 U.S. at 194. The converse is also true: where an officer has probable cause and goes to the trouble of making a custodial arrest, it is likely he does so to enforce the law, not to satisfy a grudge. *Infra* 38; 27–29 (collecting cases with probable cause where juries found no retaliation).

C. The features of retaliatory-arrest cases justify a probable-cause element

In identifying the elements of constitutional torts, this Court has also considered "details specific to" the constitutional claim at issue. *Hartman*, 547 U.S. at 259. Here, too, the distinctive features of retaliatory-arrest cases support a probable-cause element. To see why, consider the three stages of a retaliatory-arrest case: the arrest out in the field, the litigation, and the jury's deliberations. The probable-cause rule solves serious problems that would otherwise arise at each stage.

1. The Arrest. The first distinctive feature of a retaliatory-arrest case is that there are many "wholly legitimate" reasons to consider speech—including constitutionally protected speech—when making arrests. *Reichle*, 566 U.S. at 668. Take first the most obvious example: speech that "provides evidence of a crime." *Id.* Confessions, evasive answers, and implausible excuses are all speech, yet nobody thinks that officers must cast such speech out of their minds when deciding whether to arrest.

Even speech that does not provide evidence of a crime may properly influence a decision to arrest.

There is a "well established tradition of police discretion" over whether and when to perform an arrest; it is, after all, "common sense that *all* police officers must use some discretion in deciding when and where to enforce" the laws. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760–71 (2005). Exercising the discretion to arrest often requires thinking about speech. Here are some examples, all drawn from or modeled on real cases:

• *Speech suggesting a risk to the public.* An officer might ordinarily be inclined to cite rather than arrest someone unlawfully driving around the parking lot of a federal building. But when the driver does so on the anniversary of the siege at Waco, with a van painted with slogans such as "Boo ATF" and "Remember the children of Waco!" the officer may instead decide to arrest, fearing another Oklahoma City. *See Kilpatrick*, 432 Fed. App'x at 939.

• *Speech suggesting a danger to the victim.* A member of a protective detail could issue a warning when he sees a man at an event bump into a public official and then immediately apologize. But he might decide to arrest the man if, rather than apologizing, he shouts "Sic Semper Tyrannis!", because the words could lead the officer to perceive a threat to the official's safety. *Cf. Reichle*, 566 U.S. at 660–62.

• *Speech suggesting a danger to the officer.* An officer could at first decide to cite a suspect for violating open-container laws. But when the suspect, whom the officer knows to have become "combative with the police" in the past, starts hurling vulgar

slurs, the officer might change his mind; the suspect's remarks could lead him to fear that the suspect has lost control of his emotions and might take rash action. *See Lawson* v. *Martinez*, 2015 WL 1966069, at *3 (W.D. Tex. Mar. 26, 2015).

• *Speech flaunting criminality.* The Department of Justice may decide to arrest and prosecute those draft dodgers who publicly announce their refusal to register for Selective Service, on the theory that "failing to proceed against publicly known offenders would encourage others to violate the law." *Wayte* v. *United States*, 470 U.S. 598, 613 (1985).

• *Speech suggesting a risk of re-offense.* An officer who breaks up a fight may let some participants off with a warning, but arrest others because they continue to engage in heated argument—speech that leads the officer to expect the fight to resume once he leaves. *Cf. Driscoll* v. *Douglass*, 2013 WL 12075568, at *9–10 (D. Neb. Sep. 9, 2013).

• *Speech suggesting the futility of alternatives to arrest.* An officer who sees a homeless man putting up a tent on private land could think the best course is to make a polite request that the man move. But an officer who sees college students putting up tents on private land, holding signs saying "Property is Theft," could infer that a polite request will not do the trick. *Cf. Dukore* v. *District of Columbia*, 799 F.3d 1137, 1139 (D.C. Cir. 2015).

A probable-cause element allows officers to make all of these indisputably valid arrests without fear of liability. The element provides a safe harbor; so long as there is probable cause, the officer need not worry

about being sued or held liable even though his consideration of speech is (in *Reichle*'s words) "wholly legitimate."

There is no workable alternative. One cannot forbid officers from considering protected speech when making arrests; as the examples above demonstrate, the categories of unprotected speech—libel, obscenity, fighting words, true threats, and the like—simply do not map on to the legitimate grounds for considering speech when making arrests. Nor would it be feasible to develop a new taxonomy of legitimate and illegitimate ways to use speech. Lawyers might love the "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions" that would characterize that new branch of First Amendment jurisprudence, but that new taxonomy would be "literally impossible of application by the officer in the field." *New York* v. *Belton*, 453 U.S. 454, 458 (1981).

Nor would a prohibition on "animus" or "hostility" toward speech fare any better. "Animus" is hardly self-defining, and the line between legitimate contemplation of speech and illegitimate animus toward speech is hardly clear. Moreover, an officer "herself often will not know whether an illicit reason tainted her [decision], given the complex dynamic between legitimate assessments of harm and illegitimate attitudes toward opinions." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 440 (1996).

Indeed, in each of the examples above, animus toward the speech could easily be alleged as the source of the officer's decision. That problem is most obvious where the speaker directly addresses the officer; an officer who hears a combative suspect hurl a vulgar epithet would rightly worry whether others might think he acted because he felt insulted and not because he feared the situation was escalating out of control. But the same problem arises in the other examples. The officer who arrests the van driver might disagree with the driver's criticism of the government's actions at Waco. Should she really have to stop and ponder whether she is thinking—and whether a *jury* would think she is thinking—about the suspect's speech in a legitimate way (addressing a potential threat) or an illegitimate way (retaliating against a controversial idea)?

2. The Litigation. The second stage of a retaliation case—the litigation—brings to the fore a second distinctive feature of retaliatory-arrest cases: the difficulty of resolving them before trial. Motive-driven claims are already difficult to resolve at the pleading and summary-judgment stages; "the allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into [officers] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Spalding* v. *Vilas*, 161 U.S. 483, 494 (1896). These problems only become more acute in retaliatory-arrest cases.

For one thing, it is easy to accuse an officer of making an arrest because of speech. Any time the arrestee happens to be sporting a "Make America Great Again" hat, displaying a "Black Lives Matter"

bumper sticker, or even holding a camera, he could allege that the officer singled him out because of his expression. Similarly, the typical arrest involves some verbal exchange between the suspect and the officer, so it is easy to allege that it was something the suspect said, not (or not just) what he did, that led the officer to take him into custody—particularly for those who exercise their First Amendment right to sling abuse, invective, and profanity at police officers. *See Lewis* v. *New Orleans*, 415 U.S. 130, 133 (1974). And as discussed earlier, the First Amendment often *allows* officers to think about speech when making arrests; in each such case, the suspect could allege that the officer acted because of hostility to his speech, not because of the information it revealed.

For another thing, arrests are highly charged encounters, and the participants are apt to come away with different stories. The suspect may sincerely believe that the officer arrested him because of hostility to speech, but the officer may feel just as strongly that he evenhandedly enforced the law. These conflicting stories will make it uniquely difficult to resolve retaliatory-arrest claims at summary judgment if the inquiry turns entirely on the officer's state of mind.

Retaliatory-arrest cases thus pose a unique threat to the "strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El* v. *Britton*, 523 U.S. 574, 590 (1998). "It cannot be disputed seriously that [such] claims run frequently against the innocent as well as the guilty." *Harlow* v. *Fitzgerald*, 457 U.S.

800, 814 (1982). These meritless claims impose serious costs on both "the defendant officials" and "society as a whole": they deter "able citizens from acceptance of public office," and they consume the time and attention of those who fill these offices, frustrating their ability to "unflinching[ly] discharge ... their duties." *Id.*

A probable-cause element addresses these problems by allowing "insubstantial lawsuits" to be "quickly terminated." *Crawford-El*, 523 U.S. at 590. When "there is no dispute of fact, the question of probable cause is a question of law, for the determination of the court." *Crescent City*, 120 U.S. at 149. A probable-cause element thus weeds out claims at the motion-to-dismiss and (more often) summary-judgment stages. If the facts are not in dispute, or the facts in the plaintiff's own pleadings or affidavits show probable cause, the court could dismiss the lawsuit without trial and with (at most) limited discovery.

Better still, the probable-cause element achieves these goals in a principled way. This Court has rightly disclaimed the power to throw up newfangled obstacles without "precedential grounding" or "common-law pedigree" simply to protect defendants from § 1983 claims. *Crawford-El*, 523 U.S. at 594–95. The probable-cause element, however, has both grounding and pedigree: *Hartman* endorsed it for retaliatory-prosecution claims, and the common law has long required it for malicious-prosecution and false-imprisonment claims.

By contrast, eliminating the probable-cause element guarantees that many meritless claims will go

to trial. The experience of the Ninth Circuit—which has definitively rejected a probable-cause element in retaliatory-arrest cases—proves as much.

• *Ballentine* v. *Las Vegas Metropolitan Police Department*, 2017 WL 3610609 (D. Nev. Aug. 21, 2017). The Sunset Activist Collective regularly chalked Las Vegas sidewalks, often with anti-police messages such as "f— the cops" and "f— pigs." *Id.* at *1, 4. They never cleaned up their graffiti, leaving Las Vegas to do so.

Eventually, the city complained to the police department about the mounting costs—on one occasion, over a thousand dollars. *Id.* at *1, 3. So the police warned the chalkers that their actions violated state law, encouraged them to protest by holding up signs instead, and asked them to at least clean up their graffiti once finished, all to no avail. *Id.* at *3. After several more incidents, an officer got a warrant and arrested the chalkers for defacing public property. *Id.* at *4.

The district court ruled that the chalkers' retaliation case had to go to trial. One of the officers was aware of the chalkers' association with anti-police groups, had identified the content of their graffiti when seeking an arrest warrant, and had once disputed the accuracy of the chalkers' message *without even asking them to stop chalking*. From this, the court said, a jury could infer that the officer "intended to chill the plaintiffs' anti-police messages." *Id.* at *6.

• *Holland* v. *City of San Francisco*, 2013 WL 968295 (N.D. Cal. Mar. 12, 2013). As police were arresting one protester, a different one yelled "Free

her!", persistently questioned the arrest, and repeatedly disobeyed lawful orders to stand away from the arrest. *Id.* at *5. Then, she either (on the police's view) assaulted or (on her view) accidentally bumped into an officer, prompting the police to arrest her. *Id.* at *1.

The court concluded that the officers had probable cause but nonetheless had to face trial, because one could infer that the protester "would not have been arrested" but for "her persistent questioning of the officers and verbal challenges to their authority." *Id.* at *3, *5. After a five-day jury trial held three years after the protester filed her complaint, the jury found that the defendants had not "retaliated against her in violation of her First Amendment rights." ECF 168, No. 10-cv-2603.

• *Mam* v. *City of Fullerton*, 2013 WL 951401 (C.D. Cal. 2013). An officer arrested the plaintiff after he repeatedly disobeyed orders to back up while police attempted to break up a fight. The district court held that the officer had probable cause to arrest him for willful obstruction of a peace officer. *Id.* at *3–4. It nonetheless denied summary judgment as to the plaintiff's retaliatory-arrest claim: because the plaintiff was the only person known to be recording the fight, because he was the only person they arrested, and because the officer arrested him using a "leg sweep," a jury could find that the officer decided to arrest the plaintiff because he was exercising his First Amendment right to record them. *Id.* at *5.

After an eight-day trial, the jury concluded that the officer had not retaliated against the plaintiff.

The case was not "close"—"the jury spent only approximately two hours deliberating before reaching a unanimous verdict." 2014 WL 12573550, at *3 (C.D. Cal. July 24, 2014).

• *Morse* v. *San Francisco Bay Area Rapid Transit District*, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014). The plaintiff, an online journalist, had a long history of criticizing and attending protests of the local transit system. *Id.* at *1. Before one protest, officers circulated a flyer with the plaintiff's and a protest organizer's pictures, because "it was more likely than not that the protest would occur where they showed up." *Id.* at *4. During the protest, the plaintiff joined others in blocking fare gates. *Id.* at *14. Police arrested him because he was an "active participant," "marching ... around the ticket vendors, blocking fare gates, [and] impeding the flow of patrons." *Id.* at *6.

The district court held that the arrest was supported by probable cause, but sent his retaliation claim to the jury: The plaintiff had published stories critical of transit-system officials, he claimed to have been treated differently than others at the protest, and the police informed the media after the protest that no "legitimate" member of the press had been arrested. *See id.* at *9–11. After a four-day trial, the jury found that the plaintiff's speech "was [not] a 'but for' cause" of his arrest. ECF 119, No. 12-cv-05289.

• *Eberhard* v. *California Highway Patrol*, 2015 WL 6871750 (N.D. Cal. Nov. 9, 2015). The plaintiff covered a controversial construction project for a local newspaper. During a protest, police arrested him

for trespass because he was in an area of the site "fenced off from the public" and "marked off by no-trespassing signs," and he lacked the escort that he needed to be at the site. *Id.* at *4.

The court nonetheless allowed his retaliation claim to go to the jury, because he alleged (among other things) that the officers knew he was a journalist, knew he was onsite to cover the protest, knew he had criticized the Highway Patrol, and had made comments about prior incidents between the plaintiff and the police. *See id.* at *7. Two years after the plaintiff filed his complaint, the jury unanimously determined that the officer had not "violated [Eberhard's] First Amendment rights." ECF 275, No. 14-cv-1910.

• *Mihailovici* v. *Snyder*, 2017 WL 1508180 (D. Or. Apr. 25, 2017). After being *convicted* of a crime, the plaintiff sued over the underlying arrest. On the arresting officer's version of events, the plaintiff pulled up behind her during an ongoing traffic stop, aggressively approached her, and then refused to take his hands out of his pocket and to stop reaching for his fanny pack. She arrested him for interfering with a peace officer by disobeying orders. On the plaintiff's version of events, the arresting officer's chief ordered her to arrest him for complaining about police conduct.

The plaintiff sued the police chief for retaliatory arrest. Despite conclusive evidence of probable cause—again, a jury *convicted* the plaintiff—the court held that the retaliation claim "survive[d] summary judgment on the merits": The plaintiff

claimed that the police chief was hostile on a previous occasion when they spoke about police conduct. And he claimed that the police chief told the arresting officer to arrest him after he mentioned filing a complaint. *See id.* at *6. The only thing that spared the police chief from trial was timing; because the arrest occurred before the Ninth Circuit had conclusively eliminated the probable-cause element, the chief won qualified immunity. *See id.* at *6–*7.

These problems have been so serious that the Ninth Circuit has tried to contain them by rewriting the rules of summary judgment. Even though there is "almost always a weak inference of retaliation whenever a plaintiff and a defendant have had previous negative interactions," the Ninth Circuit has advised courts to overlook that inference where evidence of probable cause is "strong" and evidence of retaliatory motive is "weak"; otherwise, "nearly every retaliatory First Amendment claim would survive summary judgment," and officers would not be "protect[ed] ... from the disruption caused by unfounded claims." *Dietrich* v. *John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008). That, of course, is an unprincipled answer; the summary-judgment standard does not vary depending on the nature of the case. The very reality that the Ninth Circuit has felt the need to adjust Rule 56 to mitigate the effects of its rule shows that the rule is unsound to begin with. In any event, this procedural fudge has failed to solve the problem; as the examples just recounted show, officers continue to face trials over plainly proper arrests, in part because judges often disagree about what the undisputed facts reveal about the officer's intent. *See e.g.*, *Maidhof* v. *Celaya*, 641 Fed.

App'x 734 (9th Cir. 2016); *White* v. *County of San Bernardino*, 503 Fed. App'x 551 (9th Cir. 2013).

3. The Deliberations. The final phase of a retaliation case—the jury's deliberations—further suggests the need for a probable-cause element. In "any sort of retaliation action," the jury must decide both whether the defendant had a retaliatory motive and whether there is "a causal connection" between that motive and the later harm. *Hartman*, 547 U.S. at 259. "Our trial processes," however, "are clumsy and unsatisfying for inferring cogitations which are incidental to actions." *American Communications Association* v. *Douds*, 339 U.S. 382, 437 (1950) (Jackson, J., concurring in part and dissenting in part). Even under the best conditions, it can be hard for the fact-finder to figure out what the defendant was thinking and to decide whether he would have done the same thing had he been thinking something else.

Hartman explained that this task becomes even more difficult in a retaliatory-prosecution case, where "the requisite causation ... is usually more complex than it is in other retaliation cases." 547 U.S. at 261. In such a case, the defendant is an official who induced the prosecutor to file charges; the defendant is not the prosecutor himself, since prosecutors enjoy absolute immunity. The jury must therefore find a causal link "between the retaliatory animus of one person" (the official) "and the action of another" (the prosecutor). *Id.* at 262.

Retaliatory-arrest cases, too, present evidentiary complications. In the first place, assessing officers' motives is tricky. Officers face "kaleidoscopic situation[s]," "where spontaneity rather than adherence

to a police manual is necessarily the order of the day." *Quarles*, 467 U.S. at 656. "Undoubtedly most police officers, if placed in [those situations], would act out of a host of different, instinctive, and largely unverifiable motives." *Id.* This Court has accordingly recognized that simply "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Leon*, 468 U.S. at 922 n.23.

Moreover, "retaliatory-arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668. Indeed, they raise an even greater challenge than the average prosecution case: distinguishing decisions caused by *legitimate* consideration of speech and decisions caused by *illegitimate* consideration of speech. To recycle an example, suppose a suspect known for confrontational behavior suddenly starts yelling obscenities at the officer questioning him—leading the officer to feel insulted, but also to worry that the suspect may attack him. The officer makes an arrest. How is the jury supposed to decide whether the but-for cause of the speech was the officer's (legitimate) inference that the suspect posed a risk to his safety, or instead the officer's (illegitimate) affront at being insulted?

In addition to this fundamental difficulty, many arrest cases present the same complexity as prosecution cases: a multiplicity of participants, and a resulting need to "divin[e] the influence" of one mind upon another. *Hartman*, 547 U.S. at 263. Consider any retaliation case involving an arrest warrant.

The factfinder would have to decide whether the officer's improper motive influenced the neutral and detached magistrate—the same kind of complex causal inquiry that arises in prosecution cases. Or consider a case (like this one) in which one official or officer is alleged to have induced an officer to make the arrest. Where the spite lies in the heart of one officer but the handcuffs come from the belt of another, the factfinder will have to uncover a causal link between the motives of the former and the actions of the latter—again, the same kind of complication that arises in retaliatory-prosecution cases.

A probable-cause element solves all of these problems. As in retaliatory-prosecution cases, "evidence of the presence or absence of probable cause ... will be available in virtually every retaliatory arrest case." *Reichle*, 566 U.S. at 668. And, as in retaliatory-prosecution cases, this "highly valuable circumstantial evidence" will help simplify the causation inquiry. *Hartman*, 547 U.S. at 261. In particular, the probable-cause element helps distinguish arrests that rest on no consideration of speech at all, or on legitimate consideration of speech, from truly retaliatory ones. The presence of probable cause suggests that the officer made the arrest because the suspect may have committed a crime; the absence of probable cause suggests that the officer made the arrest because he disliked something the suspect said. The probable-cause element also helps bridge the causal gap in multiple-actor cases; here, the presence of probable cause suggests that Officer Aguirre arrested Lozman because he formed an independent judgment Lozman was violating the law, not because he was following retaliatory orders.

To be sure, *Hartman* recognized that probable cause "does not guarantee" that the challenged action is non-retaliatory. *Id.* at 265. *Hartman* also recognized, however, that this reality does not eliminate the need for a categorical rule. *See id.* at 264 n.10. The advantages of *Hartman*'s categorical approach are familiar. Like other bright lines, it promotes simplicity, provides predictability, and ensures that similar cases come out similarly. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). These advantages are particularly important in retaliatory-arrest cases, since arrests are far more common and far more pertinent to day-to-day policing than inducements to prosecute.

D. A probable-cause element is consistent with the values of the First Amendment

Finally, the Court considers "the values and purposes of the constitutional right at issue" when identifying the elements of a constitutional tort. *Manuel*, 137 S. Ct. at 921. The probable-cause element is consistent with the values and purposes of the First Amendment.

1. *Hartman* establishes that a probable-cause element comports with the values of the First Amendment. In that case, recall, postal inspectors "engineered [a] criminal prosecution" in retaliation for Moore's "lobbying Members of Congress, testifying before congressional committees, and supporting a 'Buy American' rider to the Postal Service's 1985 appropriations bill." 547 U.S. at 253–54. Even though the First Amendment generally prohibits retaliation for protected speech, and even though Moore's

speech fell within the heartland of the First Amendment, Moore could not prevail without proving probable cause. *Id.* at 265–66.

If the probable-cause element in *Hartman* comports with the values of the First Amendment, then so does the probable-cause element here. A criminal prosecution is a far greater intrusion on a defendant's liberty than an arrest. And a criminal investigator's calculated decision to engineer such a prosecution in retaliation for speech is far more blameworthy than a police officer's spur-of-the-moment decision to arrest. It would be anomalous to insist that the First Amendment requires *more* protection in the latter setting than in the former.

2. A probable-cause element also fits with this Court's preference for objective First Amendment tests. This Court's First Amendment cases generally use objective rules to judge the legality of government action. Indeed, "it is a familiar principle" of First Amendment law that a "wrongful purpose or motive" cannot invalidate "an otherwise constitutional" act. *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). This general approach lines up with the First Amendment's text; in prohibiting laws that abridge the freedom of speech, the First Amendment "does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment). This objective approach also accords with the original meaning of the First Amendment; judicial decisions "from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of

lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States*, 195 U.S. 27, 56 (1904).

This Court's retaliation cases, which do ask about motive, are an exception to these rules. Yet even in this setting, "the motive-is-all test is not the law." *Wilkie* v. *Robbins*, 551 U.S. 537, 558 n.10 (2007). To the contrary, this Court's retaliation cases use objective tests to guide the motive inquiry. Most obviously, as just discussed, a criminal defendant claiming retaliatory prosecution must show more than improper motive; he must also show the lack of probable cause. *Hartman*, 547 U.S. at 252. A public employee claiming retaliatory firing must show more than improper motive; he must also show that his speech involved a matter of public concern and that he uttered it as a citizen rather than as a public servant. *Connick* v. *Myers*, 461 U.S. 138, 146 (1983); *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006).

The justifications for these objective tests apply with full force here. Objective elements help courts avoid the "complication of [assessing] motive." *Wilkie*, 551 U.S. at 558 n.10. To the extent motive matters, "objective tests and rules" serve as useful proxies. Kagan, *Private Speech, Public Purpose*, 63 U. Chi. L. Rev. at 441. They allow courts to perform a "rough sorting" between tainted and untainted actions, without tangling themselves in the evidentiary problems raised by "a direct inquiry into motive." *Id.* The probable-cause element likewise separates properly from improperly motivated arrests; the lack of an objective justification for the arrest suggests that the arrest may have resulted from an improper motive. The proxy is of course imperfect,

but no more so than other "overinclusive and underinclusive categorical rules" deployed to "discover impermissible purpose" in First Amendment cases. *Id.* at 472. Moreover, there is no reason to think that this proxy will do a worse job at detecting and punishing improper arrests than a purely subjective test, which (because of the difficulties of assessing police intentions) will almost always leave jurors to speculate about the arresting officer's "real" motive.

Further, objective tests promote compliance in a way that a subjective inquiry into motive does not. It is "easier" for government officials "to follow rules relating to [the objective features of their acts] than to follow a command not to consider illicit factors"; after all, it is usually easier to follow directives about what not to do than to follow directives about what not to think. *Id.* at 441 n.81. Accordingly, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton* v. *California*, 496 U.S. 128, 138 (1990). A prohibition upon arrests unsupported by probable cause will yield compliance; a prohibition upon arrests that rest on impure thoughts will yield only confusion.

3. Separately, this Court's First Amendment cases calibrate doctrinal tests to reflect the real-world risk of improper government action—applying "more stringent" tests to actions that "carry greater risks of censorship," *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994), but giving governments more leeway where there is "no realistic possibility that official suppression of ideas is afoot," *R.A.V.* v. *St. Paul*, 505 U.S. 377, 390 (1992). The

probable-cause element is consistent with this principle.

The arrests that are most likely to rest on improper motives are arrests unsupported by probable cause. As discussed above, the very absence of probable cause suggests that an improper motive may have tainted the arrest. The probable-cause element allows courts to continue holding officers responsible for such arrests.

By contrast, arrests backed by probable cause pose little danger to the freedom of speech. To begin with, an officer has probable cause only if "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief" that the suspect has committed a crime. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). That is a meaningful constraint; probable cause is more than reasonable suspicion, and it is certainly more than a hunch. This limit on the scope of the arrest power *already* checks efforts to take speakers into custody purely on account of disagreement with their views; it ensures that an officer cannot go around arresting anybody and everybody with whom he disagrees.

In addition, probable cause turns on "the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). This temporal requirement further reduces the risk that police will use probable-cause-backed arrests to censor speech. It will be the unusual case where the officer both notices someone expressing views with which he disagrees and simultaneously knows facts that establish probable cause to believe that the

speaker has committed a crime. And even if he does, it will be rarer still for the officer to have the desire and ability to act on that serendipitous confluence by making an arrest. *Infra* 47–48.

4. The probable-cause element also affirmatively promotes the freedom of speech by enabling officers to make arrests that facilitate speech.

Officers must often police events that juxtapose passionate people with contradictory views: the college lecture that pits the controversial conservative speaker against the agitated progressive activists; the rally that pits the neo-Nazi protesters against the anti-fascist counter-protesters; or the city council meeting at which two sides of a hotly disputed local issue wish to be heard. In these settings, "the choice is not between order and liberty," "it is between liberty with order and anarchy without either." *Terminiello* v. *Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). If the police fail to enforce the law and to prevent disorder and violence at these highly charged events, *nobody* would get a chance to speak, and hecklers could use violence and threats to veto speech they oppose. The probable-cause element encourages officers to enforce the law at such gatherings. The lack of such an element, by contrast, would discourage officers from doing their duty, since it would be all too easy for the arrested lawbreaker to claim that the *real* reason for the arrest was his speech rather than his crime.

5. The provision of the Constitution most closely related to retaliatory arrests reinforces this assessment of the values underlying the First Amendment.

The Arrest Clause states that all "Senators and Representatives" are generally "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. Const. art. I, § 6, cl. 1.

The Arrest Clause exists to protect legislators from retaliatory arrests. "It might otherwise happen, that [a senator or representative] might be arrested from mere malice, or political persecution, and thus [his constituents] might be deprived of his aid and talents during the whole session." Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 143, p. 94 (1840). This privilege helps "secure independence, firmness, and fearlessness on the part of the members," *id.* § 144, p. 94, in the same way that retaliation doctrine helps secure those same attributes for other speakers.

Despite the obvious need to protect legislators against retaliatory arrests, however, the Arrest Clause cabins their immunity: it applies to "all Cases, *except* Treason, Felony and Breach of the Peace." U.S. Const. art. I, § 6, cl. 1 (emphasis added). This "compendious" exception encompasses "all criminal cases of every description," leaving the privilege to cover (now-obsolete) arrests in civil lawsuits. *Williamson* v. *United States*, 207 U.S. 425, 446 (1908); *see Long* v. *Ansell*, 293 U.S. 76, 83 (1934). In other words, the Constitution protects legislators from retaliation for their speech by immunizing them from arrests, but lifts that immunity where there is probable cause to believe that the legislator has committed a criminal offense, no matter how minor. The Arrest Clause thus embodies a judgment

about the relative importance of preventing politically motivated arrests and preventing crimes. Just as a valid criminal charge, supported by probable cause, justifies withholding an *immunity* designed to prevent retaliatory arrests, so too a valid criminal charge, supported by probable cause, justifies withholding a *damages remedy* designed to deter retaliatory arrests.

II. Criticisms of the Probable-Cause Element Lack Merit

Lozman criticizes the probable-cause element on doctrinal, practical, and procedural grounds. Each criticism is misplaced.

A. Lozman's doctrinal criticisms of the probable-cause element are wrong

1. Lozman first appeals to the framework for First Amendment retaliation cases established in *Mt. Healthy*. Under that framework, a plaintiff must prove that he engaged in constitutionally protected speech and that this speech was a substantial factor in motivating the challenged action. If he can do so, the government is liable unless it can show that it would have reached the same decision even in the absence of the protected speech. 429 U.S. at 287.

This Court developed the *Mt. Healthy* test to deal with retaliation claims brought by "government employee[s]." *Id.* at 283. The Court has extended the framework to similar claims by "independent contractors," *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668, 677–78 (1996), and, in a plurality opinion, to the removal of a book from a school library, *Board of Education* v. *Pico*, 457 U.S. 853 (1982). The Court has never held that *Mt. Healthy*

establishes a general framework for all First Amendment retaliation claims. In any event, the test is a poor fit for arrest cases, for three reasons.

First, it works badly in the field because it fails to account for the legitimate consideration of speech when making an arrest; an arrestee's speech might even legitimately cause an officer to make an arrest he would not otherwise have made. *Supra* 19–21. Lozman initially suggests that these legitimate considerations should be assessed at *Mt. Healthy*'s first step, which asks whether the speech is "protected." (Brief 33.) But this prong is not up to the task. For instance, the First Amendment protects both confessions and threatening language that falls short of a true threat. *Simon & Schuster, Inc.* v. *Crime Victims Board*, 502 U.S. 105, 123 (1991); *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (*per curiam*). Nobody thinks that arresting officers must cast out of their minds all confessions and threatening language that falls short of a true threat. As a result, Lozman cannot rely on the line between protected and unprotected speech to exempt obviously lawful police conduct from *Mt. Healthy*'s rule.

Lozman alternatively suggests handling the legitimate consideration of speech at *Mt. Healthy*'s second step, which concerns the defendant's state of mind. (Brief 34). *Mt. Healthy* itself asks whether the plaintiff's protected "conduct" motivated the decision, 429 U.S. at 287; Lozman tweaks this prong to ask whether the defendant's "animus" toward that conduct motivated the decision (Brief 33). But this approach is unworkable. Again, animus is not self-defining. It is difficult for an officer to psychoanalyze himself to decide whether he is considering speech

in a good way or a bad one. And it is even more difficult for a court to do so after the fact. *Supra* 22–32.

Second, the *Mt. Healthy* framework fails to protect police officers from the burdens of discovery and trial on insubstantial allegations. When state of mind is at issue, there will almost *always* be a factual dispute incapable of resolution on the papers. The cases from the Ninth Circuit, discussed above, illustrate the point. In *Holland*, for example, did the officer *really* arrest the protester for stepping into the street repeatedly? Or did he do it because the protester had been exercising her First Amendment right to criticize police? In *Mam*, did the officer *really* arrest the plaintiff for interfering with an arrest? Or did he do so based on the fact that the man in question was recording him? There is no definitive proof either way, which is why both cases proceeded beyond summary judgment. *Holland*, 2013 WL 968295 at *5–*6; *Mam*, 2013 WL 951401 at *5. So it will be in just about every case governed by *Mt. Healthy*.

Third, the *Mt. Healthy* framework produces less accurate, less reliable verdicts in arrest cases. A typical *Mt. Healthy* case involves a long-term relationship between an employee and his employer, one giving rise to considerable evidence of intent—including a paper trail (performance evaluations, disciplinary reports) and obvious comparisons (the employer's treatment of others, the employer's treatment of the employee before the speech in question). The typical arrest, however, is a one-off, highly charged encounter; there often is no preexisting relationship between the parties, no neutral record of

what the parties were thinking, and no set of similarly situated suspects for ready comparison. Because drawing reliable inferences of motive and causation is much harder in arrest cases, a probable-cause element is necessary, lest jurors be left to decide which arrests violate the Constitution based on speculation alone.

2. While Lozman attempts to expand *Mt. Healthy* beyond employment and independent contracting, he tries to limit *Hartman* to the "exercise of prosecutorial power." (Brief 40). Lozman asserts that prosecution cases raise "unique concerns." (Brief 39, 40.) But arrest cases raise some of the same concerns, plus a few new concerns of their own—the range of legitimate reasons to consider speech, the need for clear rules, the considerable risk of prolonged, intrusive discovery, and so forth. *Supra* 19–34. The distinctive features of arrest cases justify a probable-cause element in the retaliatory-arrest context, just as the features of prosecutions require the same element in the retaliatory-prosecution context.

Lozman is also wrong to argue that *Hartman* turned on difficulties created by prosecutors' absolute immunity. Instead, *Hartman* grounded its probable-cause element in the general difficulty of "prov[ing] a chain of causation from animus to injury" in retaliatory-prosecution cases. 547 U.S. at 259. That general difficulty arises in arrest cases as well—which "also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury," *Reichle*, 566 U.S. at 668—even if it stems from officers' legitimate need to consider speech in some instances rather than prosecutors'

intervening charging decisions. In fact, probable cause does as good a job separating wheat from chaff in the arrest context as in the prosecution context. That much is illustrated by the Ninth Circuit cases discussed above, in which defendant officers prevailed at trial after district courts allowed retaliation claims to go to the jury. *Supra* 27–29.

3. Lozman persists that because the First and Fourth Amendments are distinct, the Court must use different tests to determine compliance with the two. (Brief 27–29.) That is not so. First Amendment rules often overlap with, or add nothing to, protections provided by other constitutional provisions. *See, e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565 (1978) (First Amendment does not require courts to go beyond the requirements of the Warrant Clause when authorizing searches of newspapers' offices); *Eldred* v. *Ashcroft*, 537 U.S. 186, 221 (2003) (First Amendment generally does not add to the "built-in free speech safeguards" already present in copyright law); *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (same test governs personal jurisdiction in speech and non-speech cases because the "infusion" of "First Amendment concerns" "would needlessly complicate an already imprecise inquiry"); *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 393 (2011) (same test governs public employees' speech and petition claims because separate tests "would add to the complexity and expense of compliance with the Constitution"). And even though the probable-cause element makes retaliatory-arrest claims similar to Fourth Amendment wrongful-arrest claims, that does not make the First Amendment irrelevant; it will surely be easier, for example, to secure punitive

damages where the officer acted out of retaliatory spite rather than innocent carelessness.

4. Last, Lozman claims that, because probable cause does not defeat an equal-protection claim, it should not defeat a First Amendment claim either. (Brief 30.) That does not follow. First, equal-protection selective-enforcement claims come with their own objective safeguards; a plaintiff bringing such a claim must, in addition to showing "discriminatory purpose," also show a "discriminatory effect" by identifying "similarly situated individuals of a different race" against whom the government did not enforce the law. *Armstrong*, 517 U.S. at 465. This objective "effect" element performs the same kind of screening function there that the objective probable-cause element performs here. Second, the features of speech cases differ from those of arrest cases. There are many legitimate reasons to consider speech when making an arrest, but almost none to consider race or other protected characteristics. *See Whren*, 517 U.S. at 813. Finally, the values underlying equal protection differ from the values underlying freedom of speech. Motive is central to the Equal Protection Clause in a way that it is not central to the Free Speech Clause; the *sine qua non* of an equal-protection violation is "purposeful discrimination." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274 (1979).

B. Lozman's practical criticisms of the probable-cause element are wrong

1. Lozman next warns of the danger that the government will exploit its arrest power to suppress speech. But to the extent such a risk exists, it arises

most acutely with respect to arrests without probable cause, not with respect to arrests supported by probable cause.

Lozman struggles to show a danger to free speech. First, he hypothesizes that a city could "adopt a formal policy directing its police department to enforce a jaywalking statute against only those jaywalkers who are engaged in particular First Amendment-protected expression—say, wearing Black Lives Matter t-shirts or Make America Great Again hats." (Brief 26.) Lozman identifies no real-world example of any such ordinance, and no reason to think that any city would ever enact one. If any city *did* adopt such an ordinance, a court could certainly enjoin it, regardless of whether probable cause is an element of a retaliatory-arrest claim. Separate First Amendment rules prohibit content-based and viewpoint-based laws; those objective First Amendment tests, unlike the motive-centered retaliation doctrine at issue in this case, do not have a separate probable-cause element.

Second, Lozman posits that an officer could always assert probable cause for *some* crime, because "virtually every citizen has violated *some* law" during his life. (Brief 22.) But probable cause turns on "the facts known to the arresting officer *at the time of the arrest*." *Devenpeck*, 543 U.S. at 152 (emphasis added). This is an important limitation: rarely is an officer who harbors some ill will towards a speaker present at the exact moment the speaker does something that gives probable cause for an arrest.

Third, Lozman claims that arrests for minor offenses pose risks to the freedom of speech. That is

not so. There are numerous barriers to the kinds of arrests that Lozman fears. "Many jurisdictions ... have chosen to impose more restrictive safeguards [than the Constitution requires] through statutes limiting warrantless arrests for minor offenses." *Atwater*, 532 U.S. at 352 (collecting examples). In addition, police departments have their own incentives to "limit petty-offense arrests," which "carry costs that are simply too great to incur without good reason." *Id.* For instance, the officer must take the arrested individual to the police station, forcing him to spend "time away from active patrol." Brief of Texas 10, *Atwater* v. *City of Lago Vista*, No. 99-1408. Once at the station, the officer must "complete extensive paperwork." *Id.* at 11. Further, "every detainee must be booked, searched, photographed, and fingerprinted," with yet more "extensive paperwork" to be completed. Brief of Institute for Criminal Justice 12, *Atwater* v. *City of Lago Vista*, No. 99-1408. Moreover, for those who remain beyond booking, "a magistrate [must] review the case and make bonding and other release decisions," and in "most jurisdictions, a pretrial service officer will also be involved at this early stage." *Id.* at 15.

These considerable costs, "combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials," mitigate the risk that police departments in general—or even rogue officers in particular—will use minor-offense arrests backed by probable cause to suppress speech. *Atwater*, 532 U.S. at 353. In fact, the Court has *already* concluded that there is no "epidemic of unnecessary minor-offense arrests." *Id.* If

there aren't many troubling minor-offense arrests *period*, there surely aren't many retaliatory ones.

Finally, Lozman worries about arrests under laws that "are so broad" that they "potentially support probable cause in a wide variety of circumstances." (Brief 23.) But this Court has already identified the appropriate antidote to such laws: the vagueness doctrine. This doctrine already prohibits laws that are so standardless that they encourage "arbitrary and discriminatory enforcement." *Papachristou* v. *Jacksonville*, 405 U.S. 156, 170 (1972). And the doctrine applies with added rigor to laws that have the "potential for arbitrarily suppressing First Amendment liberties." *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Vagueness doctrine targets the problems raised by unduly expansive criminal laws; by contrast, retaliatory-arrest doctrine sweeps far more broadly than the problem Lozman wants it to solve, since it would allow a plaintiff to bring a retaliatory-arrest claim regardless of the breadth or specificity of the offense justifying the arrest.

2. Some amici supporting Lozman try to support his theoretical concerns with real examples. The examples on which they rely do not advance their case.

Those that most trouble amici all involve arrests unsupported by probable cause; they thus reinforce that it is only those arrests, rather than arrests backed by probable cause, that raise any serious risk to freedom of speech. Thus, one amicus discusses Sheriff Joe Arpaio's practice of arresting journalists *without* probable cause. *Lacey* v. *Maricopa County*, 693 F.3d 896, 919, 922–23 (9th Cir. 2012) (discussed

in Brief of National Press Photographers Association 9–10). Another discusses cases where the plaintiffs allegedly did nothing more than question a neighbor's arrest, Brief of MacArthur Justice Center 8, or peacefully protest in a public forum, *id.* at 4—again, cases where there is no probable cause for any crime. Yet another amicus discusses a case where the court held that the police lacked probable cause to arrest if, as the plaintiff alleged, he was doing nothing more than standing near a political sign. *Gullick* v. *Ott*, 517 F. Supp. 2d 1063, 1074–75 (W.D. Wis. 2007) (cited in Brief of Institute for Free Speech 10–12).

Next, a wide range of the examples come from opinions that rule on dispositive motions and that therefore *assume* the truth of the plaintiffs' version of the story. *See, e.g.*, *Roper* v. *City of New York*, 2017 WL 2483813, at *1 (S.D.N.Y. June 7, 2017); *Fernandes* v. *Jersey City*, 2017 WL 2799698, at *1 (D.N.J. June 27, 2017); *Marlin* v. *City of New York*, 2016 WL 4939371, at *1 (S.D.N.Y. Sep. 7, 2016); *Laning* v. *Doyle*, 2015 WL 710427, at *19 (S.D. Ohio Feb. 18, 2015); *Morse*, 2014 WL 572352, at *8; *Baldauf* v. *Davidson*, 2007 WL 2156065, at *1 (S.D. Ind. July 24, 2007). Needless to say, not all of these allegations are true. In one example, the case went to trial and the jury found the arrest *not* to be retaliatory. *See* Jury Verdict, *Morse* v. *San Francisco Bay Area Rapid Transit District*, No. 12-cv-5289 (Sept. 29, 2014) (ECF No. 119). And in other cases, the allegations are simply hard to credit. For example, the plaintiff in *Laning*, who concededly "failed to stop immediately after [an officer] activated the lights on his cruiser," alleged that she was in truth arrested

for later asking the officer, one time, why she was being detained. 2015 WL 710427, at *1, 7, 15.

The remaining examples involve arrests that appear to have been appropriate. For instance, in one case, officers arrested protesters who obstructed traffic on a busy road. Brief of MacArthur Justice Center 13–14. In another, officers arrested man who entered a government trailer at the site of a bridge collapse, "became confrontational and argumentative," and "was repeatedly asked to leave." *Galarnyk* v. *Fraser*, 687 F.3d 1070, 1072 (8th Cir. 2012) (discussed in Brief of First Amendment Foundation at 16–17). The plaintiff there claimed that police arrested him only because he had given televised interviews discussing the cause of the bridge collapse, but it is hard to believe the police would have otherwise overlooked a "confrontational and argumentative" trespasser at a disaster site.

The weakness of the amici's examples is strong evidence that retaliatory arrests are not nearly as serious a problem as they suggest. It therefore confirms the wisdom of a probable-cause element.

3. Finally, some amici assert that a probable-cause element will imperil the freedom of the press. *See* Brief of National Press Photographers Association 5; Brief of First Amendment Foundation 11. Once again, however, the examples that most vex amici involve arrests made *without* probable cause. *See, e.g., Lacey*, 693 F.3d at 922–23.

Amici assert an epidemic of retaliatory arrests of journalists, but the source on which they rely appears to count as a "journalist" anyone who happens to be holding a camera while committing a crime.

See, e.g., Minneapolis journalist arrested while covering protest, U.S. FREEDOM PRESS TRACKER, https://perma.cc/AY6B-HS2E (reporting arrest of "a journalist" with an "alt-weekly" publication who joined protesters blocking Interstate 94 in Minneapolis). In any event, the case law suggests that, on the rare occasions when reporters are arrested, that is because they joined in the illegal activity they were supposedly covering—for example, by becoming "part of the circle ... blocking fare gates," *Morse*, 2014 WL 572352, at *7, or by ignoring "no trespassing" signs and police warnings, *Eberhard*, 2015 WL 6871750, at *4–5.

C. Lozman's procedural criticisms of the probable-cause element are wrong

1. Lozman claims that it is impractical to plead lack of probable cause, because a plaintiff will not necessarily know the crime for which the officer had probable cause. That claim is unfounded. Every day, lawyers advise their clients on whether past or planned conduct violates the law. They need not "rea[d] the entire criminal code" to do so (Brief 46), just as the lawyers in this case did not have to read the entire *United States Reports* to prepare for this case. Instead, they review the facts, and then home in on those portions of the code that are most relevant. Plaintiffs' lawyers in retaliatory-arrest cases can do the same thing. In fact, they would have to do so anyway, even without a probable-cause element, because of the high probative value of probable cause in assessing motive and causation. At the very least, the plaintiff can serve the defendant with interrogatories regarding the statutes, if any, on which probable cause is predicated.

2. Lozman also claims that the probable-cause element is at the very least procedurally unnecessary, because "pleading and proof standards make it difficult for plaintiffs to establish animus." (Brief 34.) Wrong again. A plaintiff survives a motion to dismiss if he "plead[s] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). And he survives summary judgment if the evidence, taken "in the light most favorable" to him, raises a "genuine issue as to any material fact." *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*). These are low bars, and a plaintiff can surely clear them by alleging or showing that he was arrested for a less-than-serious crime after he said something controversial or hostile. The Ninth Circuit's experience proves as much. *Supra* 26–31.

Reichle highlights the inability of pleading and summary-judgment standards to do the work of the probable-cause element. In that case, Steven Howards noticed Vice President Cheney greeting members of the public at a shopping mall. Howards told a friend on the cell phone that he would ask the Vice President "how many kids he's killed today." 566 U.S. at 660. He entered the line to meet the Vice President, said that his "policies in Iraq are disgusting," and touched his shoulder as he departed. *Id.* at 661. Secret Service agents later confronted Howards, questioned him, and then arrested him for assault.

Lozman claims that even under his approach, the officers would have won a motion to dismiss. (Brief

37–38.) But how? Howards alleged that he was "approximately 2–3 feet away" from Vice President Cheney when he told him "I think your policies in Iraq are reprehensible," and that "numerous Secret Service agents" watched without saying a word. Second Amended Complaint ¶¶ 8, 10, *Howards* v. *Reichle*, No. 06-cv-01964 (D. Colo.) (ECF 31). Howards recalled how he recoiled "in shocked amazement" when accused of assault "five to ten minutes *later*." *Id.* ¶¶ 11, 13 (emphasis added). These presumptively true allegations raise a reasonable inference of animus—which is probably why the agents never bothered to file a motion to dismiss.

Lozman also suggests that his approach would have allowed the Secret Service agents to win at summary judgment (Brief 37). Again, how? The agent who overheard Howards' comment about asking Vice President Cheney "how many kids he's killed today" testified that he advised another agent to "pay particular attention" to Howards because these remarks were "unhealthy" and not "quite right." *Howards* v. *McLaughlin*, 634 F.3d 1131, 1136 (10th Cir. 2011). The arresting agent—who was specifically informed of that earlier conversation—acknowledged that "the conversation on the cell phone" partly motivated the arrest. *Id.* at 1137. On these facts, a reasonable jury could of course infer that the agents arrested Howards because they disliked his speech, not because they found his remarks suggested a threat.

Lozman persists that the causation element would save the day, because it is "almost certain" that "the arresting officers would have made the decision regardless." (Brief 37). But almost doesn't cut

it at summary judgment. Each year, thousands of politicians experience a pat on the shoulder without feeling assaulted, and none of the agents who *witnessed* the incident chose to stop Howards at the time, let alone arrest him. And many, many people make false but unimportant statements to federal officials without being hauled away in handcuffs. Would a jury really be prohibited from inferring that Howards would not have been arrested but for his anti-war speech? The Tenth Circuit didn't think so—after all, Agent Doyle admitted that the overheard remarks "disturbed" him, and Agent Reichle "admitted he considered this cell phone conversation when deciding to arrest." 634 F.3d at 1145. Far from demonstrating that the no-probable-cause element "is unnecessary" (Brief 37), *Reichle* proves precisely the opposite.

In all events, pleading and proof standards are not a panacea. "Even where personal liability does not ultimately materialize, the mere specter of liability may inhibit public officials in the discharge of their duties," "for even those officers with airtight [summary-judgment motions] are forced to incur the expenses of litigation and to endure the diversion of their official energy." *Atwater*, 532 U.S. at 351 n.22.

3. Finally, Lozman halfheartedly claims that qualified immunity will shield officers from liability. (Brief 37–38.) But if Lozman wins, qualified immunity will no longer do any work in retaliatory-arrest cases. The ruling would clearly establish the legal principle that improperly motivated arrests trigger liability even in the presence of probable cause; all that would be left to litigate would be factual questions regarding the motive for the arrest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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